

**NO. PD-1090-18
NO. PD-1091-18**

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

FILED
COURT OF CRIMINAL APPEALS
12/14/2020
DEANA WILLIAMSON, CLERK

NATHAN FOREMAN	§	APPELLANT
	§	
VS.	§	
	§	
THE STATE OF TEXAS	§	APPELLEE

APPELLANT'S MOTION FOR REHEARING

**CAUSE NOS. 14-15-01005-CR & 14-15-01006-CR
IN THE COURT OF APPEALS FOR
THE FOURTEENTH DISTRICT**

**APPEAL IN CAUSE NOS. 1374837 & 1374838
IN THE 177TH JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS**

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TO THE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW NATHAN RAY FOREMAN, Appellant herein, by and through his attorney, **STANLEY G. SCHNEIDER**, and pursuant to Tex. R. App. P. 79.2 and files this Motion for Rehearing from the denial of his Petition of Discretionary Review on November 25, 2020, wherein this Court reversed the en banc decision of the Fourteenth Court of Appeals and affirmed the trial court's denial of his motion to suppress the search of his business and would show the Court the following:

ISSUE PRESENTED

This Court's opinion on November 25, 2020, reversing the decision of the En Banc Fourteenth Court of Appeals conflicts with well-established precedent of this Court and the Supreme Court of the United States and ignores the facts contained within the four corners of the affidavit to justify the seizure of computers and surveillance cameras from a building located at 2501-C #2 Central Parkway, Houston, Texas.

REASON FOR REHEARING

This Court's opinion eviscerates the requirement of the U.S. Const. amend. IV and Tex. Const. art. I, § 9 that a search warrant affidavit must articulate specific facts within the affidavit's four corners to justify a magistrate's determination of probable cause and authorize the seizure of computers and surveillance equipment at a target location. The specific facts within the affidavit's four corners must be sufficient for

a reasonable person to infer that particular evidence exists at a “target location.”

This Court, in considering the totality of the circumstances, used multiple inferences or speculative assumptions that might provide the basis for the seizure of computers and surveillance equipment without the actual affidavit mentioning a single fact relating to either computers or cameras or surveillance equipment. This Court’s opinion conflicts with well established precedent of the Supreme Court as well as this Court’s precedent.

In its opinion, this Court held that the building’s description in the affidavit could provide the factual basis for the issuance of a search warrant for computers, surveillance equipment or cameras. This Court quotes the second paragraph of the affidavit that describes the building. (Slip opinion p. 3) as the basis of the opinion. This Court ignored the plain reading of the four corners of the affidavit which clearly indicates that the building’s description was designed to accurately describe the target location for the search. The affiant did not intend for any reasonable person to consider the description of the building as a fact that would provide the basis for probable cause.

This Court ignored the actual probable cause statement which was designed to inform the magistrate of the facts that would support the issuance of the search warrant. The second paragraph’s description of the building is only for identification

purposes.

The third paragraph of the affidavit begins with the heading,

“MY BELIEF IS BASED UPON THE FOLLOWING FACTS:”

(CR 49).

This portion of the affidavit then describes witness reports of finding the complainants on the roadside with hands tied and gunshot wounds. The affidavit then describes Glekiah’s account of what transpired at the auto shop: that Glekiah and Merchant met someone named “Jerry” at the auto shop for a “business transaction”; that the complainants were grabbed by several males, beaten, and tied up with zip ties; that the suspects took the complainants’ cash, wallets, cell phone, and a suitcase/briefcase; that the suspects poured gasoline on the complainants and held a lighter near them; and that the suspects loaded the complainants into a van at gunpoint. The affidavit next recounts how Glekiah directed police to the auto shop; that the business documentation showed that the location was owned by the wife of Nathan Ray Foreman; and that Glekiah identified Foreman in a photo array. The affiant concludes that the complainants’ and suspects’ “DNA will be inside the location,” along with the complainants’ “money, suitcase/briefcase, wallets, cell phone, identification cards,” as well as instrumentalities of the crime such as the van, guns, and zip ties. (CR 49-50).

There are no facts contained in the affidavit that anyone reported that automobiles were observed inside the building.

The “inferences” drawn by this Court are not supported by any fact within the affidavit’s four corners that could justify a magistrate’s probable cause determination that computers existed in the building. The description of the building was not designed to provide a substantial basis for the issuance of the warrant.¹

This Court’s multiple inferences are cumulative guesses that evidence might exists even though they were unintended by the affiant:

Inference One

The **target location was** a business amongst other businesses **within a single story building complex**. (Slip opinion p. 11).

This Court assumed from the fact that the business was located within a “single story building complex,” provided a magistrate the basis to infer that the business dealt in tangible goods, and possibly even cash. Since the business might deal in tangible goods and possible cash, a magistrate could infer the need for heightened need to keep its premises secure.

There is no evidence in the affidavit, other than a sign, that the target location

¹ Justice Christopher in her dissenting opinion relies on this Court’s rationale to determine that a magistrate can infer that co-defendants confer on cell phones to justify probable cause. *Baldwin v. State*, 14-19-00154, slip opinion p. 9 (December 10, 2020).

was a business let alone a business that dealt with tangible goods or cash that would require a heightened need for security.

Inference Two

This Court noted that the affidavit **described the target location** as being “made of metal and brick,” with “dark tinted glass windows and black painted aluminum.” (Slip opinion p. 12).

This Court opines that from the existence of tinted windows, a magistrate could reasonably conclude that, not only did this business have a heightened need for security measures, but that the existence of tinted windows inferred that the business owners might have other security measures in place on the premises.

Does this Court mean that the existence of window coverings in a home infer that a homeowner has security measures in place? Or, are window coverings used for privacy? Or, do window covering provide insulation from the heat or cold. Tinted windows, like any window covering, are also an indication that a person desires privacy.

Inference Three

This Court noted that the affidavit explained that this business was called “Dreams Auto Customs” and was in fact an “autoshop.” (Slip opinion p. 12).

Based only on the name on a sign, this Court opined that a magistrate could

reasonably infer that the target business involved the customization of automobiles. From that inference, this Court opined again that inference a magistrate might reasonably conclude that the business dealt with uniquely mobile and highly valuable tangible goods.

From a sign on a building, one can only speculate that sign relates to any activity inside without other facts. A name on a building invites speculation about the activity inside the building without other identifiable facts from someone who had been inside.

Inference Four

This Court stated that a magistrate could infer from a sign on a building that it contained a business that did some sort of customized automotive work. This Court then inferred that a magistrate could reasonably believe that customized items warranted extra security. Then this Court inferred that a magistrate might then reasonably believe that because the business did customized work on automobiles, which meant that the business needed a means of keeping tabs on “the coming and goings of vehicles in its care”. A magistrate might believe that surveillance equipment existed. (Slip opinion p. 13).

Inference Five

This Court noted that the affidavit described the business’ bay doors that

opened into the interior of the building.

From this fact, this Court assumed that a magistrate might infer that automobiles upon which “Dreams Auto Customs” worked, if it did, were brought directly into the business which required surveillance equipment for either security or liability purposes. Thus, “the business needed to be able to keep an eye on the interior of the business.” (Slip opinion p. 13).

This Court inferred that based on these “concrete indicators”, the business “had a unique need for security”. (Slip opinion p. 13). Therefore, “it was logical for the magistrate to infer that to probable degree of certainty associated with probable cause, the business was equipped with a video surveillance system.”

This Court stated that

This does not mean that based on the articulated facts, we consider it more-than-fifty-percent probable that the target business was using surveillance equipment. That is not what probable cause demands. It means only that based on the totality of the articulated facts, it was not unreasonable for the magistrate to discern a “fair probability” of such equipment being found.

Foreman v. State, 2020 Tex. Crim. App. LEXIS 959 (Nov. 25, 2020).²

² The instant opinion conflicts with the rationale of Judge Keaseler in his majority opinion in *Ford v. State*, 158 S.W.3d 488, 492-493 (Tex. Crim. App. 2005), where this Court ruled that a police officer has reasonable suspicion to believe that an individual is violating the law if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person actually is, has been, or soon will be engaged in criminal activity. This is an objective standard that disregards any subjective intent of the officer making the stop and looks solely to whether an objective basis for the stop exists.

The affidavit contains no facts that justify the seizure of computers or surveillance equipment. *See Nathanson v. United States*, 290 U.S. 41, 44, 47 (1933).

A reasonable person cannot conclude with any degree of certainty that the interior of the described building contained surveillance cameras or if there were surveillance cameras inside the building that surveillance recordings were stored on computers or that there existed computers in the building. While this Court voiced skepticism at the State’s suggestion that it was “common knowledge” that all business had surveillance equipment (Slip opinion p. 10), this Court assumptions ratified the State’s argument. The description of the building provides no information from which a reasonable person could infer what is inside a building. Likewise a description of a house can only be used to identify the location to be searched.

The Supreme Court has not defined specifically what it means by the term “reasonable inference. The Court uses it in several different contexts. First the phrase is used in the context of search warrant affidavits. Second, the Court uses the phrase in the context of warrantless stops of people. This Court has embraced the Supreme Court’s rational.

Unmistakenly, a magistrate is permitted to interpret the affidavit in a

The same objective rationale must apply to a probable cause determination by magistrate when considering the four corners of a search warrant affidavit.

non-technical, commonsense and realistic manner and to draw reasonable inferences from the facts and circumstances contained within its four corners. *Flores v. State*, 319 S.W.3d 697, 702 (Tex. Crim. App. 2010); *Illinois v. Gates*, 462 U.S. 213, 235-238 (1983); *Hankins v. State*, 132 S.W.3d 380, 388 (Tex. Crim. App. 2004). The test propounded by the Supreme Court is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a “substantial basis” for the seizure of certain objects as possible evidence. *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984); *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007); *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012).

The Supreme Court clearly stated in *Gates*, 462 U.S. at 240 that:

It is one thing to draw reasonable inferences from information clearly set forth within the four corners of an affidavit, but *a reviewing court may not “read material information into an affidavit that does not otherwise appear on its face.”*

(Emphasis added).

The Supreme Court has provided examples of what it means by “reasonable inferences”.

In *Illinois v. Wardlow*, 528 U.S. 119, 124-125 (2000), the Court observed that

“Taken together, the condition of the house and the conduct of the partygoers allowed the officers to make several ‘common-sense

conclusions about human behavior.” *Gates*, *supra*, at 231 (quoting *United States v. Cortez*, 449 U. S. 411, 418 (1981)). Most homeowners do not live in near-barren houses. And most homeowners do not invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to leave their floors filthy. The officers could thus infer that the partygoers knew their party was not authorized.

The partygoers’ reaction to the officers gave them further reason to believe that the partygoers knew they lacked permission to be in the house. Many scattered at the sight of the uniformed officers. Two hid themselves, one in a closet and the other in a bathroom.

In *District of Columbia v. Wesby*, 138 S. Ct. 577, 587 (2018) the Court observed that the “[U]nprovoked flight upon noticing the police,” “is certainly suggestive” of wrongdoing and can be treated as “suspicious behavior” that factors into the totality of the circumstances. In fact, “deliberately furtive actions and flight at the approach of . . . law officers are strong indicia of mens rea.” *Sibron v. New York*, 392 U. S. 40, 66(1968); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975). Flight is the consummate act of evasion from which a reasonable inference can be drawn that the individual is engaged in criminal activity.

In *Ornelas v. United States*, 517 U.S. 690, 699-700 (1996), in discussing reasonable suspicion and reasonable inferences, the Court noted what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December

in Milwaukee. That city is unlikely to have been an overnight stop selected at the last minute by a traveler coming from California to points east. The 85-mile width of Lake Michigan blocks any further eastward progress. And while the city's salubrious summer climate and seasonal attractions bring many tourists at that time of year, the same is not true in December. Milwaukee's average daily high temperature in that month is 31 degrees and its average daily low is 17 degrees; the percentage of possible sunshine is only 38 percent. It is a reasonable inference that a Californian stopping in Milwaukee in December is either there to transact business or to visit family or friends. The background facts, though rarely the subject of explicit findings, inform the judge's assessment of the historical facts.

The core of the warrant clause in the U.S. Const. amend. IV and Tex. Const. art. I, § 9, requires that a magistrate not issue a search warrant without first finding probable cause that a particular item will be found in a particular location. *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012); *see* U.S. Const. amend. IV; Tex. Const. art. I, § 9. A magistrate should not have to resort to inferences and “common sense” conclusions that skirt the boundaries of what constitutes a substantial basis, as they do here. *When too many inferences must be drawn, the result is a tenuous rather than substantial basis for the issuance of a warrant. Davis v. State*, 202 S.W.3d 149, 157-158 (Tex. Crim. App. 2006); *Baldwin v. State*, 14-19-

00154 (December 10, 2020) en banc.

As Justice Jackson stated in *Johnson v. United States*, 333 U.S. 10, 13 (1948).

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Rodriguez v. State, 232 S.W.3d 55, 59-60(Tex. Crim. App. 2007).

In fact as long ago as 1932, this Court held that an affidavit is inadequate if it fails to disclose facts which would enable the magistrate to ascertain from the affidavit that probable cause exists for the search. *Garza v. State*, 120 Tex. Crim. 147, 48 S.W.2d 625, 627-28 (Tex. Crim. App. 1932) (op. on reh'g). The probable-cause standard means that the affidavit must set out sufficient facts for the magistrate to conclude that the item to be seized will be in the described premises at the time the warrant issues and the search executed. *Schmidt v. State*, 659 S.W.2d 420, 421 (Tex. Crim. App. 1983); *Cassias v. State*, 719 S.W.2d 585, 588 (Tex. Crim. App. 1986).

Affidavits are to be read “realistically and with common sense,” and reasonable inferences may be drawn from the facts and circumstances set out within the four corners of the affidavit. But there must be sufficient facts within the affidavit

to support a probable-cause finding that the evidence sought is available and at the target location. *Davis v. State, supra*. 202 S.W.3d at 154; *Hankins v. State*, 132 S.W.3d 380, 388 (Tex. Crim. App. 2004); *Crider v. State*, 352 S.W.3d 704, 707 (Tex. Crim. App. 2011).

This Court has repeatedly stated that whether *a reasonable* reading by the magistrate would lead to the conclusion that the affidavit provided a “substantial basis for the issuance of the warrant[,]” “[t]he magistrate’s sole concern should be probability.” Probable cause exists when, under the totality of the circumstances, there is a “fair probability” that contraband or evidence of a crime will be found at the specified location. *Rodriguez v. State*, 232 S.W.3d at 60-61; *Illinois v. Gates*, 462 U.S. at 238-39; *Ramos v. State*, 934 S.W.2d 358, 362-63 (Tex. Crim. App. 1996), cert. denied, 520 U.S. 1198, 117 S. Ct. 1556, 137 L. Ed. 2d 704 (1997). This would require that the affidavit mention the items to be seized.

In the instant case, there was not even an allusion in the affidavit that computers or camera existed inside or outside the building. In upholding the seizure of the computer this Court had to resort to inferences and “common sense” conclusions that skirt boundaries of what constitutes a substantial basis for the issuances of a warrant. When this Court draws as many inferences as it did, the results is *a tenuous rather than substantial basis for the issuance of a warrant*.

This Court did no more than speculate that the surveillance equipment existed. The affidavit did not provide any facts that would allow the magistrate to make the judgment as to probable cause to seize the computers. When there is no evidence that a computer was directly involved in the crime, more is needed to justify the seizure of a computer. There must be some evidence that the computer existed and that evidence might exist on the computer.

If a magistrate is permitted to infer that a video surveillance system was located in the auto body shop without any facts supporting the existence of that item, a magistrate could make those same inferences for a variety of items in any business or home. This reasoning could lead to all computers and cell phones being searchable for any type of video or picture that could have recorded a crime, even though the affiant provides no facts suggesting that a computer or cell phone existed. Such an inference goes too far and is contrary to well established precedent by this Court and the Supreme Court of the United States.

Under Texas law, “[n]o search warrant shall issue for any purpose unless *sufficient facts* are first presented to satisfy the issuing magistrate that probable cause does in fact exist for its issuance.” Tex. Code Crim. Proc. Ann. art. 18.01(b) (West Supp. 2015). For an evidentiary search warrant, the sworn affidavit must set forth *facts sufficient* to establish probable cause:

- (1) that a specific offense has been committed,
- (2) that the *specifically described property or items that are to be searched for or seized* constitute evidence of that offense or evidence that a particular person committed that offense, and
- (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.

Id. Tex. Code Crim. Proc. Ann. art. 18.01(c); *see also Id.* Tex. Code Crim. Proc. Ann. art. 18.02(10) (West Supp. 2015); *Carmen v. State*, 358 S.W.3d 285, 297 (Tex. App.—Houston [1st Dist.] 2011, pet. ref’d). *Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013); *Baldwin v. State*, 278 S.W.3d 367, 371 (Tex. Crim. App. 2009).

The instant affidavit contains no facts from which it can be inferred that customers of custom auto shops attempt to steal their own cars “from time to time.” A magistrate can not surmise that auto shops run surveillance to prevent customers from recovering their own vehicles. This is not a commonsense reading of the affidavit especially given its structure and the obvious purpose of the description of the building.

It is not a common sense reading of the affidavit to suggest that a building built

of metal and bricks with tinted windows would equate to the owner's heighten concern for security. It is not a common sense reading of the affidavit that because there was a sign that suggested that it was a custom auto body shop that there were high valued goods inside the building or that the business received cash.

There are no cases that allow the number of inferences made by this Court to substantiate the seizure of a computer. The affidavit in this case did not establish any nexus between the criminal activity being investigated and the existence of surveillance system. It cannot be reasonably inferred from the four corners of the instant affidavit that surveillance equipment would be found in the shop. *See Rodriguez*, 232 S.W.3d at 62.

This Court has noted in a different context that it can be difficult to differentiate between inferences and speculation, and between drawing multiple reasonable inferences versus drawing a series of factually unsupported speculations. *See Hooper v. State*, 214 S.W.3d 9, 16 (Tex. Crim. App. 2007). That is what this Court did. In affirming the trial court, this Court created factually unsupported speculative inferences to support a determination of probable cause. A practice that *Gates* and its progeny clearly prohibit.

The decision of the Court of Appeals should be affirmed and decision of the trial court reversed.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Court grant rehearing, withdraw its prior decision and affirm the en banc decision by the Fourteenth Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing Appellant's Motion for Rehearing has been mailed, emailed and/or hand delivered on the office of the State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711 and to the office of the Harris County District Attorney's Office, 500 Jefferson, Suite 600, Houston, Texas 77002, on this 10th day of December 2020, to the following:

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/s/ Stanley G. Schneider
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CERTIFICATE OF COMPLIANCE AND DELIVERY

This is to certify that: (1) this document, created using WordPerfect™ X7 software, contains 3,768 words, excluding those items permitted by Rule 9.4 (i)(2)(B), Tex. R. App. Pro., and complies with Rules 9.4 (i)(2)(B) and 9.4 (i)(3), Tex. R. App. Pro.; and (2) on December 12, 2020 a true and correct copy of the above and foregoing Appellant's Motion for Rehearing was transmitted via the e-Service function on the State's e-Filing portal, to Clinton Morgan, counsel of record for the Harris County District Attorney's Office and Stacey Soule, State Prosecuting Attorney.

/s/ Stanley G. Schneider

Stanley G. Schneider

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